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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

KENNETH B. SAWATZKY,

Petitioner,

v.

CITY OF OKLAHOMA CITY,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Criminal Appeals Of The State Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

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1. Petitioner's First Amendment rights were not violated by his conviction.

2. The federal question of the free speech clause of the First Amendment of the United States Constitution was not pressed or passed on in the Court of Criminal Appeals of the State of Oklahoma and therefore, this Court does not have jurisdiction over this Petition for Writ of Certiorari.

3. Sections 30-151 and 30-152 of the Municipal Code of the City of Oklahoma City (1993), as applied to Petitioner, are not overbroad.

4. This Court cannot issue advisory opinions to state courts.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, the City of Oklahoma City ("the City"), respectfully prays that this Court deny Petitioner's Petition for Writ of Certiorari filed herein.

STATEMENT OF THE CASE
FACTUAL BACKGROUND

On March 1, 1994, the City Council of the City of Oklahoma City amended its "offer to engage in a lewd act" prohibition ordinance to read as recited in Petitioner's Petition.[1] Even prior to this Amendment and prior to the Petitioner's arrest on July 6, 1994, the City had posted signs at Hobie Point in Lake Hefner, advising people at the lake that undercover officers would be in the area. (Tr. 101.) This lake area, including this peninsula, is used for sailing, fishing, bird watching, a Boy Scout Explorer troop, model airplane flying, and other nature activities. (Tr. 97, 99-100.)

On the day of Petitioner's arrest, an undercover male police officer was assigned to work the Hobie Point area by his supervisor, as the police had received numerous

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[1] On December 19, 1995 the City Council of the City of Oklahoma City amended Section 30-152 of the 1993 Municipal Code to read as follows:

> (a) No person shall, *in a public place,* engage in or offer to engage in any act of prostitution or other act of lewdness or to solicit, induce, entice, or procure another to commit or engage in any act of prostitution or other act of lewdness. (Emphasis added.)

complaints as to moral violations occurring at this location. (Tr. 98, 105.) The officer was leaning up against his car when the Petitioner walked past him, smiled at him, and asked the officer if he had a cigarette. (Tr. 107.) The officer struck up a conversation with Petitioner. The Petitioner eventually advised the officer that he wanted to go to the officer's hotel and take a shower. (Tr. 111.) As the two were leaving the area, the officer asked the Petitioner what "he liked to do." (Tr. 113.) The Petitioner responded "I like it all." (Tr. 120.) The officer again asked the Petitioner what he liked to do. The Petitioner responded "I want to suck a dick." (Tr. 113.) The Petitioner was arrested and charged with a violation of § 30-151 and § 30-152 of the Municipal Code of the City of Oklahoma City.

Proceedings in the Oklahoma Courts:

On August 8, 1994 an amended information was filed in the Municipal Court of the City of Oklahoma City, charging that Petitioner:

> [O]n or about Jul 6, 1994 at 1:30 pm at or near 3298 W. Britton Road, within the corporate limits of the City of Oklahoma City, State of Oklahoma the Sawatsky [sic], Kenneth, did then and there willfully, wrongfully and unlawfully commit the crime(s) of:
>
> Count #1: Offering to engage in an act of lewdness by committing the following acts: (1) Kenneth Sawatsky [sic] asked Officer Ledford, not his spouse, "If we could go there (Holiday Inn) to take a shower" . . . , an act in furtherance of an act of lewdness; (2) Kenneth Sawatsky [sic]

> told Officer Ledford "I want to suck a dick", an act of lewdness by giving or recieving [sic] of the body for fellatio with a person not his spouse, contrary to the provisions of Oklahma [sic] City Municipal Code Section 30-151, Ordinance Number 20114, and against the peace and dignity of the City of Oklahoma City.

This amended information was served on the Petitioner by certified mail on August 9, 1994.

On July 27, 1994, Petitioner filed a Motion to Dismiss and Brief In Support. Petitioner's Brief argued that the information should be dismissed because the Municipal Code Sections violated (1) his right to privacy under art. 2, §§ 2 and 7, of the Constitution of the State of Oklahoma; (2) his right to equal protection under art. 2, § 7, of the Oklahoma Constitution and under the Fourteenth Amendment to the United States Constitution; and (3) his rights under the establishment clause of the First and Fourteenth Amendments to the United States Constitution and art. 1, § 2, of the Oklahoma Constitution. The Petitioner apparently argued that his state right of privacy was violated because consensual same gender sexual acts must now be lawful as the Oklahoma Court of Criminal Appeals had held in *Post v. State*, 715 P.2d 1105 (Okla. Cr. 1986), *rehearing denied*, 717 P.2d 1151 (Okla. Cr. 1986), *cert. denied, Oklahoma v. Post*, 479 U.S. 890, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986), that Oklahoma's sodomy prohibition, 21 O.S. § 886, was unconstitutional as applied to consensual non-commercial, heterosexual sodomy. The Petitioner's equal protection argument alleged, without any facts to support it, that these code sections were being enforced only against homosexual males – which

Petitioner claims was a suspect class – as is defined in equal protection cases. Petitioner's establishment clause argument was that the same-sex sodomy prohibitions are illegally based upon tenets of the Christian Church.

The Petitioner's Motion to Dismiss was set for oral argument on September 1, 1994. The Petitioner's counsel stated during this argument that "[w]e have not been alleging in our attack on the ordinance, the previous ordinance or the amended ordinance, a vague and overbroad argument. We could have made that argument." (September 1, 1994, Tr. 21.) Further, at page 23, Petitioner's counsel stated: "We have not attacked this on vagueness and overbreadth. . . . " The only free speech argument appears to be that raised orally at pages 6 and 7, when Petitioner argues that if the underlying conduct was lawful "then you certainly have the constitutional right to ask someone to commit these consensual acts." The Municipal Court denied the Motion to Dismiss, and the case was set for trial.

On November 27, 1994, this case was tried to a jury. The City called one witness: the undercover officer, and rested. The Petitioner called no witnesses and rested. The defense again moved to dismiss and argued at Tr. 126-127:

> It seems to me that to be arrested under the ordinance that they brought, a person has to make a proposal to someone not his spouse to engage in sexual relations with a person not his spouse, not to discuss academically an interest in sexuality. . . .
>
> Now, Your Honor, in our motion to dismiss, we outline several other constitutional bases that

> we don't want to be construed to have waived, but with your permission, I will not restate those this afternoon, our reliance on the post-case, our reliance upon violation of equal protection and the enforcement of this, and then the violation of First Amendment protection both of free speech and entanglement of church and state, unless the Court desires for me to revisit those issues.

The Court overruled the Motion to Dismiss. The jury found the Petitioner guilty and set his punishment at a $250 fine.

The Petitioner appealed his conviction to the Oklahoma Court of Criminal Appeals. The Petitioner raised the same arguments as was contained in his written Motion to Dismiss filed in the Municipal Court on July 27, 1994. The City asserts that the only issues Petitioner properly preserved can be summarized as follows:

(1) Whether Oklahoma City's Municipal Code §§ 30-151 and 30-152 (1993), violate Appellant's [Petitioner's] right to privacy, as guaranteed under art. 2, §§ 2 and 7, of the Oklahoma Constitution.

(2) and (3)
Whether Oklahoma City's Municipal Code, §§ 30-151 and 30-152 (1993), violate Appellant's [Petitioner's] right to equal protection, as guaranteed under art. 2, § 7, of the Oklahoma Constitution and under the Fourteenth Amendment to the United States Constitution.

(4) Whether Oklahoma City's Municipal Code, §§ 30-151 and 30-152 (1993), violate Appellant's [Petitioner's] right guaranteed under art. 1, § 2,

> of the Oklahoma Constitution, pertaining to protection of religious expression, comparable to the Establishment Clause of the First Amendment of the United States Constitution.

It is the City's contention that Petitioner has waived any argument as to the alleged constitutional infirmities on these ordinances, based upon the free speech clause of the First Amendment of the United States Constitution, either on a claim of facial overbreadth or as applied, by his failure to assert them in the highest state court. (See Propositions 2 and 3.) The only new argument was that the City had failed to argue a "compelling interest" in response to his equal protection and establishment arguments.

On November 12, 1995, the Court of Criminal Appeals issued its opinion, which upheld the Petitioner's Municipal Court conviction. The Court declined to decide Petitioner's privacy argument and held that, because Petitioner's status was neither *quasi*-suspect nor suspect, the City need only to show a rational basis for its ordinances and, as applied, the Petitioner's conviction for a public solicitation of a sexual act, regardless of whether the underlying sexual act was legal, was valid. The Court held in a footnote that the Petitioner's First Amendment "free speech" rights were not violated because:

> [R]easonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture. In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is

> simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable.

(Pet. App., p. 4a, n.7.)

REASONS FOR DENYING PETITIONER'S PETITION

Since the date of Petitioner's arrest on July 6, 1994, this case has always been about whether the City could prohibit any person from offering to engage in an act of lewdness. The Petitioner attempted to turn this into a case to decide whether consensual non-commercial private same-sex sodomy is lawful under Oklahoma's Constitution. The Oklahoma Court of Criminal Appeals properly refused to decide this issue and held that, as applied, the City's ordinances lawfully prohibited the Petitioner from stating in a public place, to an undercover officer, "I want to suck a dick," under circumstances later determined by a jury to have constituted an offer to engage in lewd conduct. The Petitioner's Motion to Dismiss claimed to raise the free speech issue in the Municipal Court of Oklahoma City. He did not brief the issue. He mentioned his free speech claim again during his Demurrer to the evidence. (Tr. 126-127.) His Brief in the Court of Criminal Appeals did not raise the free speech issue. This Court should not exercise jurisdiction over this case pursuant to 28 U.S.C. § 1257(a), since Petitioner neither pressed at the appellate stage nor did the Court of Criminal Appeals fully present the issue of whether the Oklahoma City Municipal Code, §§ 30-151 and 30-152 (1993), violated Petitioner's free speech rights, pursuant to the First Amendment of the Constitution of the United

States. Further, the Petitioner's counsel specifically advised the Municipal Court that he was not attacking the ordinance as "overbroad." (September 1, 1994, Tr. 21, 23.) For these reasons alone, this Court should deny the Petition, but if not, the City asserts that this Court should deny the Petition in that the Petitioner's own First Amendment rights were not violated, and that, as he was lawfully convicted, Petitioner cannot assert that the ordinance might violate the rights of others. Lastly, it appears that Petitioner is requesting that this Court require that the Oklahoma Court of Criminal Appeals decide the issue of the legality of homosexual sodomy under the Oklahoma Constitution.

Proposition No. 1. Petitioner's First Amendment Rights Were Not Violated by His Conviction.

Petitioner assumes that the City cannot lawfully prohibit a person from attempting to solicit a sexual act when that person states "I want to suck a dick," absent a compelling interest. Petitioner further asserts that protecting "listeners" from overhearing the solicitation is not a compelling interest. The Petition does not address the protection of those who may be offended by these in-person solicitations. The City asserts that Petitioner's argument is contrary to numerous cases of this Court.

It is important to note that the Petitioner was not engaging in a political debate over the legality or morality of his status as a homosexual at the time of his arrest, but was instead attempting to solicit a person of the same sex into committing an act that is still illegal under Oklahoma law. (21 O.S. § 886.) Secondly, Petitioner argues that

ordinances like the ones at issue can only be valid if the underlying conduct is validly proscribed. If this is the case, then by the same argument, any law protecting citizens from libel, slander, misrepresentation, false advertising, unfair debt collection actions, stalking, or harassment is invalid as the violator could claim that as the underlying conduct was not illegal, the prohibition would be violating his First Amendment's freedom of speech right.

This Court has long recognized that not all speech is entitled to the protection of the First Amendment. In *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), this Court stated "[i]n light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." And this Court, quoting from its prior opinion in *Thornhill v. State of Alabama*, 310 U.S. 88, 101, 102, 60 S.Ct. 736, 84 L.Ed. 1093, 1102 (1940), stated:

> The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully *all matters of public concern* without previous restraint or fear of subsequent punishment.

Roth, 354 U.S. at 487. (Court's emphasis.)

In *Roth*, this Court held obscene material was not protected by the First Amendment. The test of obscenity was redefined in *Miller v. California*, 413 U.S. 15, 25, 93 S.Ct. 2607, 37 L.Ed.2d 419, 431 (1973), when this Court gave as an example several types of material that could be lawfully determined to be obscene. This Court stated:

> It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. . . .

See also Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), wherein this Court reaffirmed that material designed for and disseminated to a clearly defined deviant sexual group that appeals to the prurient interest in sex of the members of that group could be held to be obscene. The City submits that Petitioner's statement, "I want to suck a dick," meets the definition of obscenity as defined by this Court in *Roth*, and *Miller*, as it describes the ultimate sex, whether homosexuals are labeled "deviant." This statement was not made as part of a political protest or a public statement concerning the issues of gay rights and the Petitioner's citations to this Court's opinions involving public expressions of a political statement [*Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971); *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987), *appeal dismissed, cert. denied, Hill v. City of Houston, Tex.*, 483 U.S. 1001, 107 S.Ct. 3222, 97 L.Ed.2d 729 (1987)], are not relevant to the facts of this case.

Even if this Court were to hold that Petitioner's speech was protected by the First Amendment, the question remains as to how much protection it is to be afforded. In various contexts, this Court has in fact

looked to the content of the speech to see how much protection is to be afforded. For instance, in *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), this Court held that a public figure must show a false statement of fact made with actual malice before recovering damages for intentional infliction of emotional distress, whereas, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985), this Court held that in matters not involving "public concern" no showing of actual malice was needed to recover damages for a false statement. Thus, the content of the speech must be examined to determine if a false statement is made, and if the person or the "matter" was of public concern. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69-71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976), this Court stated:

> Surely the First Amendment does not foreclose such a prohibition; yet it is equally clear that any such prohibition must rest squarely on an appraisal of the content of material otherwise within a constitutionally protected area.
>
> Such a line may be drawn on the basis of content without violating the government's paramount obligation of neutrality in its regulation of protected communication. For the regulation of the places where sexually explicit films may be exhibited is unaffected by whatever social, political, or philosophical message a film may be intended to communicate; whether a motion picture ridicules or characterizes one point of view or another, the effect of the ordinances is exactly the same.

> Moreover, even though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice. Even though the First Amendment protects communication in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures.

More on the point of this case, this Court stated in *Dun & Bradstreet*, that: "[w]e have long recognized that not all speech is of equal First Amendment importance.[5]

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[5] This Court on many occasions has recognized that certain kinds of speech are less central to the interests of the First Amendment than others. . . . "

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. at 785 and n.5.

In *Hustler Magazine v. Falwell*, 485 U.S. 46, 56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), this Court stated:

> Admittedly, these oft-repeated First Amendment principles, like other principles, are subject to limitations. We recognized in Pacifica Foundation, that speech that is " 'vulgar,' 'offensive,' and 'shocking' " is "not entitled to absolute constitutional protection under all circumstances." 438 US, at 747, 57 L Ed 2d 1073, 98 S Ct 3026.

In *F.C.C. v. Pacifica Foundation*, 438 U.S. 726, 746-747, 98 S.Ct. 3026, 57 L.Ed.2d 1073 (1978), this Court stated:

> If there were any reason to believe that the Commission's characterization of the Carlin monologue as offensive could be traced to its political content – or even to the fact that it satirized contemporary attitudes about four letter-words – First Amendment protection might be required. But that is simply not this case. These words offend for the same reasons that obscenity offends. (Footnote omitted.) Their place in the hierarchy of First Amendment values was aptly sketched by Mr. Justice Murphy when he said: "[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 US 568, 572, 86 L Ed 1031, 62 S Ct 766.
>
> . . .
>
> Indeed, we may assume, arguendo, that this monologue would be protected in other contexts. Nonetheless, the constitutional protection

> accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context. It is a characteristic of speech such as this that both its capacity to offend and its "social value," to use Mr. Justice Murphy's term, vary with the circumstances. Words that are commonplace in one setting are shocking in another.

The Petitioner argues that the City failed to express any compelling state interest in attempting to prohibit the solicitation of certain sexual acts. The City disagrees with this argument for two reasons. Initially, the City would assert that even if some state reason is required to prohibit offers like the Petitioner's, it is not required that the interest be "compelling." Secondly, the undercover officer testified as to the interest to be protected: that this public park was used by children, sailboaters, and nature lovers; that the City has tried to warn off the people using the park illegally, and that the police department still received "numerous" complaints. Lastly, the Petitioner's Petition at Proposition II, pages 14-18, cites some eight cases from seven different jurisdictions, all of which concern attempts to prohibit the same type of conduct as Petitioner's. The Petitioner's conduct herein obviously offends someone. At least eight jurisdictions have had sufficient complaints from citizens to attempt to enact laws to prohibit such conduct. As the Oklahoma Court of Criminal Appeals stated in its opinion:

> In our view, reasonable prohibitions against soliciting sexual acts do not violate the First Amendment whether the underlying conduct is lawful or unlawful. Our view is based upon the unique status of sexual conduct in our culture.

> In our community, some forms of overt sexual conduct, including the solicitation of some sexual acts, is simply not appropriate in public places. To suggest that government cannot prohibit such solicitation is unfathomable.

Even if, as Petitioner argues, the City is required to show a "compelling interest" to validate the ordinances in question, the City asserts that based upon this Court's decision in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991), the City has a compelling interest. In *Barnes*, this Court stated:

> This and other public indecency statutes were designed to protect morals and public order. The traditional police power of the States is defined as the authority to provide for the public health, safety, and morals, and we have upheld such a basis for legislation. In Paris Adult Theatre I v Slaton, 413 US 49, 61, 37 L Ed 2d 446, 93 S Ct 2628 (1973), we said:
>
> > 'In deciding Roth [v United States, 354 US 476 [1 L Ed 2d 1498, 77 S Ct 1304] (1957)], this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect "the social interest in order and morality." [Id.], at 485 [1 L Ed 2d 1498, 77 S Ct 1304].' (Emphasis omitted.)
>
> And in Bowers v. Hardwick, 478 US 186, 196, 92 L Ed 2d 140, 106 S Ct 2841 (1986), we said:
>
> > 'The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.'

> *Thus, the public indecency statute furthers a substantial government interest in protecting order and morality.*

Id., 501 U.S. at 569. (Emphasis added.)

Petitioner suggests that any people who might overhear such a solicitation, if offended, could just avert their ears. Petitioner's argument ignores those people who receive the solicitation. The City asserts that Petitioner's suggestion that the recipients could just avert their ears is not consistent with either this Court's prior opinions or with the realities of such a public, unwanted offer. In *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 127-128, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), this Court stated:

> The private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in Pacifica. *In contrast to public displays, unsolicited mailings and other means of expression which the recipient has no meaningful opportunity to avoid,* the dial-it medium requires the listener to take affirmative steps to receive the communication. *There is no "captive audience" problem here; callers will generally not be unwilling listeners.* The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message. Placing a telephone call is not the same as turning on a radio and being taken by surprise by an indecent message. Unlike an unexpected outburst, on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising

> that it prevents an unwilling listener from avoiding exposure to it. (Emphasis added.)

And in *F.C.C. v. Pacifica Foundation*, this Court stated:

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

F.C.C. v. Pacifica Foundation, 438 U.S. at 748-9. (Footnote omitted.)

In *Frisby v. Schultz*, 487 U.S. 474, 497, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), this Court stated:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. See Consolidated Edison Co. v. Public Service Comm'n of New York, 447 US 530, 542, 65 L Ed 2d 319, 100 S Ct 2326 (1980). Cf. Bolger v. Youngs Drug Products Corp., supra, at 72, 77 L Ed 2d 469, 103 S Ct 2875. The target of the focused picketing banned by the Brookfield ordinance is just such a "captive." The resident is figuratively, and perhaps literally, trapped within the home, and because of the unique and subtle impact of such picketing is left with no ready means of avoiding the unwanted speech.

Even if, as Petitioner argues, the unwilling listener must turn his or her ears, the City would assert that the unwilling recipient of such a solicitation is just as captive as was the target of residential picketing in *Frisby*.

Lastly, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66-68, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), this Court stated:

> The idea of a "privacy" right and a place of public accommodation are in this context, mutually exclusive. Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.
>
> . . .
>
> Where communication of ideas, protected by the First Amendment, is not involved, or the particular privacy of the home protected by Stanley, or any of the other "areas or zones" of constitutionally protected privacy, the mere fact that, as a consequence, some human "utterances" or "thoughts" may be incidentally affected does not bar the State from acting to protect legitimate state interests. Cf. Roth v. United States, supra, at 483, 485-487, 1 L Ed 2d 1498; Beauharnais v. Illinois, 343 US, at 256-257, 96 L Ed 919. The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution. Cf. United States v. Reidel, supra, at 359-360, 28 L Ed 2d 813 (Harlan, J., concurring).

The Petitioner was not engaged in any public debate on the morality or legality of sodomy involving members

of the same sex on July 6, 1994. He was instead attempting to satisfy his own sexual desires by the solicitation of a criminal act. His words should not be protected by the First Amendment. But even if they were, the City's protection of the unwilling listener and the unwilling recipient override any claim of protection of the Petitioner's solicitation.

Proposition No. 2. The Federal Question of the Free Speech Clause of the First Amendment of the United States Constitution Was Not Pressed or Passed On In the Court of Criminal Appeals of the State of Oklahoma and Therefore, This Court Does Not Have Jurisdiction Over this Petition for Writ of Certiorari.

In the Opinion of the Court of Criminal Appeals issued November 21, 1995, Vice Presiding Judge Chapel outlined the thrust of this case:

> This case is neither about the regulation of conduct – between consenting adults in the privacy of their bedrooms, nor the legal status to be provided to homosexual persons. Fundamentally, this case is about whether Oklahoma City may legally prohibit public solicitations for private non-commercial acts of sodomy.

(Pet. App., pp. 1a, 2a.)

On review of a Petition for a Writ of Certiorari, this Court has held that it will refuse to consider any federal question grounds if the question was not pressed or decided in the highest state court below. *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S.Ct. 670, 84 L.Ed. 849 (1940). This Court stated:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. Blair v. Oesterlein Mach. Co., 275 US 220, 225, 72 L ed 249, 252, 48 S Ct 87; Duignan v. United States, 274 US 195, 200, 71 L ed 996, 1000, 47 S Ct 566. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.
>
> Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of *state* statutes not urged or considered there.

Id., 309 U.S. at 434. (Emphasis supplied.)

Therefore, for purposes of jurisdiction under 28 U.S.C. § 1257(a), a federal question must be timely presented by Petitioner or squarely addressed before the highest state court before the particular federal question will be reviewed by the Supreme Court.

Title 28 U.S.C. § 1257(a) provides:

> **§ 1257. State courts; certiorari**
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision *could*

> *be had, may be reviewed* by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(Emphasis added.)

a. Overbreadth

The Petitioner's counsel twice stated in oral argument before the Municipal Court that Petitioner was not challenging this ordinance as being overbroad. The Petitioner did not raise this issue in his appeal to the Oklahoma Court of Criminal Appeals.

In fact, in the Opinion of the Court of Criminal Appeals, the Court noted the overbreadth waiver in its Opinion, n.1:

> However, this Court addresses only the fellatio portion of this definition, clearly an act of sodomy, because it is the only portion implicated by the facts of this case and because Sawatzky *failed to attack* the *ordinance as overbroad.*

(Pet. App., p. 2a, n.1.) (Emphasis supplied.)

b. Free Speech

Petitioner discusses *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), regarding the reversal of

a municipal court conviction for disturbing the peace for wearing a jacket bearing the words "Fuck the Draft." Unlike this appeal, Defendant Cohen had pressed the federal constitutional question of whether the statute had violated his freedom of expression rights guaranteed by the First and Fourteenth Amendments to the United States Constitution throughout the trial proceedings and the appeals to the highest state court. This Court stated:

> The question of our jurisdiction need not detain us long. Throughout the proceedings below, Cohen consistently claimed that, as construed to apply to the facts of this case, the statute infringed his rights to freedom of expression guaranteed by the First and Fourteenth Amendments of the Federal Constitution. That contention has been rejected by the highest California state court in which review could be had. Accordingly, we are fully satisfied that Cohen has properly invoked our jurisdiction by this appeal. 28 U.S.C. § 1257(2); *Dahnke-Walker Milling Co. v Bondurant*, 257 US 282, 66 LEd 239, 42 SCt 106 (1921).

Id., 403 U.S. at 17-18.

In contrast, in the case at bar, the Petitioner's counsel briefly mentioned the First Amendment's free speech argument orally in the Municipal Court, but not in his written briefs filed in the Municipal Court[2] or in the Oklahoma Court of Criminal Appeals. The Oklahoma Court of Criminal Appeals, in a footnote, in response to

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[2] As stated earlier, Petitioner's Motion to Dismiss mentioned free speech as an issue, but Petitioner failed to argue that point in his Brief in Support of that Motion.

Petitioner's abandoned equal protection claim, stated that the ordinance may implicate the First Amendment free speech right of Petitioner.

The City contends the First Amendment right to free speech was not presented by the Court of Criminal Appeals except tangentially. Therefore, the Supreme Court has no jurisdiction as a substantial federal question since it was not pressed by the final order of the highest criminal court of the State of Oklahoma, and the Petitioner had further not perfected the free speech federal question in his appeal from the criminal conviction after a trial to a jury. As Petitioner Sawatzky did not pursue his claim on infringement of free speech First Amendment rights, as well as the overbreadth issue beyond the trial level, and failed to urge the overbreadth issue at all, the City would assert there is no substantial federal question before the Supreme Court since both propositions in the Petition for a Writ of Certiorari argue claims based on free speech rights pursuant to the First Amendment. Therefore, this Court should decline to exercise jurisdiction over this case and deny the Petition for Writ of Certiorari for lack of a substantial federal question.

Proposition No. 3. Sections 30-151 and 30-152 of the Municipal Code of the City of Oklahoma City (1993) as Applied to Petitioner Are Not Overbroad.

Petitioner, at Proposition 1B argues that his conviction must be set aside as the ordinances at issue herein prohibit private, welcomed sexual advances. Of course, these are not the facts of the case at bar. The offer was

made in a public park to an obviously unwilling participant.

In *Frisby v. Schultz*, 487 U.S. 474, 483, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) this Court stated:

> To the extent they endorsed a broad reading of the ordinance, the lower courts ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties.

In *Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1978), this Court stated:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. See, e.g., Austin v. The Aldermen, 7 Wall 694, 698-699, 19 L Ed 224 (1869); Supervisors v. Stanley, 105 US 305, 311-315, 26 L Ed 1044 (1882); Hatch v. Reardon, 204 US 152, 160-161, 51 L Ed 415, 27 S Ct 188 (1907); Yazoo & M. V. R. Co. v. Jackson Vinegar Co., 226 US 217, 219-220, 57 L Ed 193, 33 S Ct 40 (1912); United States v. Wurzbach, supra, at 399, 74 L Ed 508; Carmichael v. Southern Coal & Coke Co., 301 US 495, 513, 81 L Ed 1245, 57 S Ct 868, 109 ALR 1327 (1937); United States v. Raines, 362 US 17, 4 L Ed 2d 524, 80 S Ct 519 (1960). A closely related principle is that constitutional rights are personal and may not be asserted vicariously. See McGowan v. Maryland, 366 US 420, 429-430, 6 L Ed 2d 393, 81 S Ct 1101 (1961).

The Oklahoma Court of Criminal Appeals correctly held that in the facts of this case, Petitioner's public solicitation of sodomy could be punished. Further, the ordinance has now been changed to make clear that the prohibition of such offers are those made in public. Therefore, the City would assert that Petitioner cannot assert the rights of a third party who may be, but has not been, charged.

Proposition No. 4. This Court Cannot Issue Advisory Opinions to State Courts.

In Petitioner's second proposition, Petitioner appears to be requesting this Court either to order the Oklahoma Court of Criminal Appeals to decide whether the same-sex sodomy prohibition of 21 O.S. § 886 is constitutional under the Oklahoma Constitution (see Petition, p. 14, n.6), or to issue an advisory opinion to state courts who may be faced with the enforcement of a similar ordinance. (See Petition, p. 18.) Regarding the same-sex sodomy prohibition, this Court in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), decided that under the Fourteenth Amendment to the United States Constitution, homosexuals did not have a fundamental right to engage in consensual sodomy. The Oklahoma Court of Criminal Appeals held that it need not decide this issue under the Oklahoma Constitution under the facts of this case. Petitioner's First Amendment right, if any, is outweighed by protecting unwilling listeners and/or recipients of such solicitations. Petitioner's First Amendment arguments raised herein are a ruse to attempt to get this Court to order the Oklahoma Court of Criminal Appeals to decide the same-sex sodomy issue.

Regarding the Petitioner's request for an advisory opinion, this Court stated in *Broadrick v. Oklahoma*, 413 U.S. 601, 610-611, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973):

> These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws. See Younger v. Harris, 401 US 37, 52, 27 L Ed 2d 669, 91 S Ct 746 (1971).

Petitioner's conviction in the case at bar is not at odds with the First Amendment. The other state cases cited by Petitioner are no longer at issue. This Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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